

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

MARK HOFFMAN, on behalf of himself
and all others similarly situated,
Plaintiff,

v.

HEARING HELP EXPRESS, INC.,
Defendant.

CASE NO. 3:19-cv-05960-RBL

**DECLARATION OF JIM
HOULIHAN IN SUPPORT OF
DEFENDANT HEARING HELP
EXPRESS, INC.'S OPPOSITION
TO PLAINTIFF'S MOTION TO
COMPEL**

NOTED FOR CONSIDERATION:
May 22, 2020

ORAL ARGUMENT REQUESTED

I, Jim Houlihan, declare as follows:

1. I am over 18 years of age. I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify competently thereto.

2. I am the President of Hearing Help Express, Inc. ("Hearing Help") and Vice President of Direct-to-Consumer at IntriCon, Inc. I have held these positions since September of 2016. Hearing Help sells hearing aids direct-to-consumer and was established in 1979. Hearing Help currently has approximately 12 employees. The number is approximate due to layoffs as a result of the current COVID-19 pandemic.

3. Part of my job responsibilities include overseeing various departments in the company, including but not limited to, sales and marketing. One of the ways Hearing Help receives contact information for potential hearing aid customers is by working with lead

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OF OPPOSITION TO MOTION TO COMPEL - 1
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1 generation companies. Once a lead is sold to Hearing Help, Hearing Help places its own
2 outbound calls. Hearing Help has various sources of obtaining customer leads – some through
3 direct efforts of the company and some through hiring lead generation vendors. Over the past
4 five years, Hearing Help has worked with multiple third parties to generate leads on its behalf
5 using various lead generation activities.

6 4. With respect to this litigation, Hearing Help worked with a company called
7 Triangular Media Corp. (“Triangular”) to generate customer leads for Hearing Help. Triangular
8 was not hired to—and I believe it did not—place any outbound calls on Hearing Help’s behalf.
9 After Triangular sold a lead to Hearing Help, Hearing Help placed its own outbound
10 telemarketing calls. Hearing Help does not hire third parties to place calls on its behalf to sell its
11 products. Hearing Help began speaking with Triangular in May of 2018. On June 13, 2018,
12 Hearing Help signed Triangular’s “Lead Buyer Insertion Order/Contract” (“Insertion Order”). A
13 true and correct copy of the Insertion Order that was signed by Hearing Help is attached hereto as
14 **Exhibit 1**. As to the generation of leads, the Insertion Order provides as follows:

15 IVR generated leads for Hearing Aids originating from TV
16 commercial/Direct Mail. Prospects responding will place an
17 inbound call to a toll-free number, through which they will respond
18 to an IVR survey including the above-referenced vertical.

19 The other lead generation companies Hearing Help has worked with over the past five years were
20 under separate contracts and in different ways that are completely unrelated to Triangular or
21 Plaintiff.

22 5. Consistent with the Insertion Order, Triangular advised to Hearing Help that it
23 would generate leads for Hearing Help only through direct mail and/or from a TV commercial. In
24 this regard, Triangular was to send direct mail to individuals advertising a product/service
25 unrelated to Hearing Help, which would prompt the person to call a phone number if they wanted
26 more information. The phone call would lead the person to Triangular’s interactive voice
27 response (“IVR”). For the commercial, an individual would see the commercial on TV
28 advertising a product/service unrelated to Hearing Help. The commercial would have a phone

1 number for people to call if they wanted more information, which would lead them to
2 Triangular's IVR.

3 6. Triangular provided Hearing Help with the IVR and the questions it asks, and I
4 have listened to it. I understand that this IVR was the one Triangular used during the entire time
5 Triangular sold customer leads to Hearing Help. Triangular's IVR asks for people to identify the
6 following information: first name; last name; zip code; mailing address; date of birth; and e-mail
7 address. The IVR then asks the person if they would like to receive information about certain
8 products from specific companies and asks some other questions based on certain responses. One
9 of these prompts is about Hearing Help. Specifically, the IVR asks: "If you suffer from hearing
10 loss, Hearing Help Express has a solution. I would like to offer you a risk free 45-day trial to get
11 your hearing better today. If you suffer from hearing loss, have good credit, and would like a
12 hearing specialist to call you back to tell you about their program, please say 'yes.' Otherwise,
13 say 'no.'"

14 7. At the very end of the IVR, it states as follows: "Thank you for completing our
15 survey. By participating in our survey and requesting your free telephone consultation, you agree
16 to be called by providers of the services you requested via an autodialed call or prerecorded
17 message, regardless of whether your phone number is mobile or your status on any state or
18 federal do not call list. Your consent is not a condition of making any purchase. For the services
19 you've requested additional information, a specialist will be calling you back shortly. Please say
20 'yes' to confirm your request and to receive these services."

21 8. I have listened to the recording of the IVR involving Plaintiff Mark Hoffman. Mr.
22 Hoffman responded "yes" when asked if he wanted a hearing specialist to call him. At the end of
23 the IVR, Mr. Hoffman responded "no". Hearing Help understands that there was a glitch in
24 Triangular's IVR that registered the "no" at the end as a "yes".

25 9. Triangular advised that only individuals who responded "yes" to the question
26 about Hearing Help and "yes" to the very end of the IVR would be sold as a lead to Hearing Help.
27 Based on this representation, Hearing Help believed that all leads sold to it by Triangular had
28 provided express consent under the Telephone Consumer Privacy Act ("TCPA") to be contacted

1 by Hearing Help. Hearing Help had no reason to believe that any leads Triangular sold had not
2 expressly consented to be called by Hearing Help, regardless of the call method Hearing Help
3 used. Hearing Help maintains a do not call list for any customer who asked to stop being called
4 by Hearing Help.

5 10. Hearing Help no longer works with Triangular and the date the last Triangular lead
6 was sold to Hearing Help was October 20, 2019.

7 11. After Mr. Hoffman filed his lawsuit, Hearing Help became aware that Triangular
8 used the services of another company called Skyscrapers (Pvt.) Limited ("Skyscrapers") to assist
9 with the generation of customer leads for Hearing Help and for Triangular's other clients. With
10 respect to Mr. Hoffman, Hearing Help understands that after Mr. Hoffman provided his contact
11 information on a website operated by Skyscrapers, that Skyscrapers called him. On one of these
12 calls, Mr. Hoffman's call was transferred to Triangular's IVR.

13 12. Triangular never informed Hearing Help of its relationship with Skyscrapers or
14 that some of the leads sold to Hearing Help involved any other entity. Triangular did not have
15 authority to use Skyscrapers to assist with the generation of leads for Hearing Help. Hearing
16 Help did not know that Skyscrapers made calls to potential leads for Hearing Help until after this
17 lawsuit was filed.

18 I declare under penalty of perjury under the laws of the United States of America that the
19 foregoing is true and correct.

20 Executed on May 18, 2020, at DeKalb, Illinois.

21
22
23 By:


Jim Houlihan

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Attorney for Plaintiff

Signed at Seattle, Washington this 18th day of May 2020.

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